United States v. Pena, 07-30007

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Considering just how intrusive a computer search and seizure is for all sorts of information unrelated to crime, great care is needed in evaluating whether there is probable cause.[1] I do not think that the search warrant affidavits of the Washington and Ohio police officers established a "fair probability" sufficient for probable cause.[2] Although that standard is lower than "certainty or even a preponderance of evidence," it is higher than the mere suspicion that would be required for a Terry stop.[3]

The pictures at issue were not shown to the magistrate who issued the search warrant, so all he had were the affidavits of the Ohio police officer and the

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[1] See United States v. Gourde, 440 F.3d 1065, 1077-78 (9th Cir. 2006) (Kleinfeld, dissenting) (describing the many private and perfectly legal things people store on their computers).

[2] Illinois v. Gates, 462 U.S. 213, 246 (1983).

[3] Gourde, 440 F.3d at 1069.

Washington police officer. The Ohio police officer described the four females pictured as being "approximately fourteen," "approximately fourteen," "approximately ten or eleven," and "approximately ten to twelve." The Washington police officer wrote that "the ages of the females are difficult to estimate," but "the females did appear to be minors," which would mean under eighteen. Without seeing the pictures, I do not see how the magistrate could accept the two affidavits as establishing probable cause to believe that the four females were under eighteen.

Though the majority disposition only mentions it in a footnote, the prosecution presented extensive testimony from a pediatrician, Dr. Simms, at the suppression hearing. The pediatrician said that he could not conclude that any one of the females pictured was under eighteen without looking at a birth certificate. When asked about each picture, Simms declined to firmly state that the females depicted were under the age of eighteen. At most, he was equivocal.

When looking at image seven, he testified that the female "was more likely under the age of eighteen," but it was "possible" that she was over the age of eighteen. For image eight, when asked whether the female depicted was over or

under eighteen, Simms responded, "I don't know." For image nine, Simms testified that the female depicted "could be younger than fourteen and could be older than fourteen," and that it is "possible [that she] is over the age of eighteen." He paused after describing image nine and said, "if somebody told me that this girl that we're looking at right now in image nine was under eighteen, that's totally believable to me. But if she was twenty-two, that would be also totally believable. There's just that much range variation among females' development." When looking at image ten, Simms stated that "I really couldn't tell you that she's older or younger than eighteen. If she told me she was younger than eighteen, that would totally fit . . . [b]ut if she said she was over eighteen, that would be totally possible as well . . . I wouldn't be surprised either way." Finally, when looking at image eleven, Simms couldn't conclude whether the female depicted was under the age of eighteen. Simms had no idea whether it was "more likely than not that she's over or under the age of eighteen."

The name of the chat room in this case is not as obviously suggestive that there would be pictures of underage females as the web site in Gourde.[4] This case

[4] Gourde, 440 F.3d at 1067.

is also not like United States v. Battershell.[5] Probably anyone can distinguish an eight to ten year old, as in that case, from an eighteen year old, but it is not obvious whether someone is fourteen or eighteen. The chat room name here, "preten89101112," could mean "preteen," or it could mean, "pretend." Though the briefs do not mention any significance of the numbers, government counsel suggested at oral argument that they should be read as ages, 8, 9, and so forth, but neither the affidavits presented to the magistrate nor counsel pointed this out before, so it is not reasonable to think that the magistrate spotted the significance of the number series and relied on it. Pena's screen name, "ucandoitagain," apparently refers to his impotence, and has no apparent connection to young girls.

There is nothing in the affidavits to establish that Pena would have seen the Ohio police officer's self-description as a fourteen year old female. As the majority concedes, the police officers really did not agree, and the Washington police officer carefully avoided expressing his own agreement under oath with the Ohio police officer's estimate that two of the four girls were approximately ten, eleven, or twelve years old.

[5] United States v. Battershell, 457 F.3d 1048 (9th Cir. 2006).

Without the pictures, without agreement from the police officers that the girls were pre-pubertal, and without a more plainly suggestive site name or solicitation, and with what the prosecutor's pediatrician testified was the impossibility of telling a teenaged female under eighteen from a teenaged female over eighteen without a birth certificate, I do not think the affidavits established probable cause.